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No. _____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,

Petitioner,

v.

LARRY BUELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Is the "manifest necessity" test applicable when a mistrial is declared on the basis of information which, although disclosed prior to the attachment of jeopardy, assumed significance only after the attachment of jeopardy?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on March 17, 1992.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 221 Conn. 407, ___ A.2d ___ (1992) and is reprinted in the appendix, p. A1, *infra*.

JURISDICTION

The decision of the Connecticut Supreme Court was entered on March 17, 1992. The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 27 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The defendant was charged by information with Failure to Appear in the first degree, in violation of Connecticut General Statutes §53a-172. The defendant's trial was scheduled to commence on March 21, 1990. App. at A2.

On March 16, 1990, members of the New Haven State's Attorney's Office interviewed Rose Mumford. Mumford provided them with information that inculpated the defendant. She was served with a subpoena to testify at the defendant's trial.

On March 21, 1990, prior to the jury being sworn, the trial court heard argument on three motions to quash subpoenas brought by defense counsel, John R. Williams. The motions concerned subpoenas served on Williams's law partner, Sue L. Wise, the defendant's mother, and Mumford. Williams purported to represent each of the women and proceeded to argue the merits of the motion to quash the subpoena served upon Wise. App. at A4. The prosecutor expressed surprise that Williams purported to represent Mumford. Following argument, the trial court

denied the motion to quash. Immediately thereafter, the prosecutor requested and received permission to add several names, including Mumford's, to its witness list. The jury was then sworn. App. at A5.

On the third day of trial, after presenting the testimony of seven witnesses, the prosecutor attempted to arrange Mumford's transportation to court. Mumford told the prosecutor that she had spoken with Williams who had told her she did not have to obey the subpoena. Mumford also told the prosecutor that she was represented by Williams.[1] The prosecutor asked that Williams be disqualified from representing Mumford and recommended that the court appoint other counsel for her. The prosecutor expressed strong opposition to a mistrial. App. at A6.

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[1] The following discussion occurred:
THE COURT: In what capacity?
[THE PROSECUTOR]: I don't know?
THE COURT: She is not a defendant?
[THE PROSECUTOR]: She is a prosecution witness. I spoke to her. I subpoenaed her long before there was any mention of Mr. Williams . . . .Now suddenly, Your Honor, I have a key prosecution witness who was placed under subpoena a long time ago and suddenly Mr. Williams' appearance comes up, and he says he represents her.

Attorney Williams acknowledged that he represented Mumford and informed the court that Mumford intended to exercise her privilege against self-incrimination. Williams was also opposed to a mistrial. He represented that the defendant and Mumford would each waive their right to conflict-free representation and suggested that the court conduct a hearing for this purpose. App. at A6-A7.

Following a recess, the court, sua sponte, declared a mistrial. It concluded that Williams' dual representation of the defendant and a state's witness posed "an unconscionable and impossible hurdle to surmount."

The defendant subsequently moved to dismiss the information on the ground that a second prosecution would constitute double jeopardy. An independent trial court concluded that a manifest necessity existed for the declaration of the mistrial "or the ends of public justice would have been defeated" and denied the defendant's motion. The defendant appealed to the Connecticut Supreme Court. App. at A8.

The Connecticut Supreme Court, in an opinion joined by five of the seven justices who heard the case, reversed

the judgment of the trial court and remanded the case with direction to grant the motion to dismiss. *State v. Buell*, 221 Conn. at 417; App. A16 . The majority concluded that no manifest necessity existed because the reason for the mistrial--William's dual representation of the defendant and a state's witness--was known to the court before jeopardy had attached. *Id.* at 416; App. at A15. The majority focused solely on the timing of the disclosure of the information, ignored the circumstances as they existed at the time the mistrial was declared, and afforded no deference at all to the trial court's exercise of its discretion. *Id.* at 416-17.

The two justices who concurred in the result only believed that it was "unprecedented and unwise" to focus exclusively upon the timing of the disclosure of the information. *Id.* at 418-19 (Borden and Covello, Js., concurring) They opined that that fact should be subsumed in a traditional manifest necessity analysis. *Id.*

REASON FOR GRANTING THE PETITION

The Court Below, In Focusing Solely On The Timing Of The Disclosure Of Information Pertaining To The Reason For A Mistrial, Has Thwarted The "Public Justice" Policy Underlying The Manifest Necessity Standard

This case presents a substantial issue regarding the "manifest necessity" standard of appellate review first articulated in *United States v. Perez*, 9 Wheat 579, 580 6 L.Ed. 165 (1824). By focusing exclusively on the timing of the disclosure of the information pertaining to the reason for the declaration of a mistrial, and not examining the circumstances as they exist at the time the mistrial is declared, the Connecticut Supreme Court has fashioned a mechanical rule that thwarts the public justice policy embodied in the manifest necessity standard. Moreover, such a rule affords no deference to the trial court's exercise of its discretion. The decision has important ramifications because the erroneous declaration of a mistrial, even over the strenuous objection of the state, forecloses further attempts to prosecute. The state supreme court's pronouncement on such an important question of federal law should be reviewed by this Court especially where, as

here, the state court is itself divided and its opinion is unprecedented.

The Opinion Of The State Court Thwarts The "Public Justice" Policy of *United States v. Perez*

Justice Story first articulated in *Perez* the standard a trial court must apply in determining whether to grant a mistrial over defense objection:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated.

22 U.S. (9 Wheat.) at 580. This rule thus embodies a "public justice" policy; *Illinois v. Somerville*, 410 U.S. 458, 464 (1973); and is designed to promote "the ends of justice." *Wade v. Hunter*, 337 U.S. 684, 690 (1949).

The ends of justice are completely subverted when, as here, the state court concludes that a manifest necessity does not exist simply because some information bearing on the reason for the mistrial came to the attention of the trial court prior to the attachment of jeopardy. A criminal

trial is, "even in the best of circumstances, a complicated affair to manage." *United States v. Jorn*, 400 U.S. 470, 479 (1971). It is entirely possible that something known prior to the attachment of jeopardy could assume a significance it did not initially appear to have. *See State v. Buell*, 221 Conn. at 418 (Borden and Covello Js., concurring); *see also Wade v. Hunter*, 376 U.S. at 639 ("there may be unforeseeable circumstances that arise during a trial making its completion impossible. . . "). This is such a case.

Here, Attorney Williams's representation of Mumford came to light during the course of a hearing on a motion to quash various subpoenas that had nothing to do with dismissal or double jeopardy. Neither the state, the defendant, nor the court fully appreciated the significance of this fact at the time. Moreover, neither the trial court nor the prosecutor knew at the time that Williams was, in essence, interfering with the state's proof by counselling a state's witness, who was then under subpoena, not to testify. By focusing exclusively upon the timing of the disclosure of Williams's dual representation, and neglecting to analyze the circumstances at the time the mistrial was declared,

the Connecticut Supreme Court has seriously undermined the public justice policy of *Perez* and its progeny. *See e.g. Illinois v. Somerville*, 410 U.S. at 464, *Wade v. Hunter,* 336 U.S. at 690-91.

Indeed, the state court has, in effect, imposed upon trial judges the burdensome, if not impossible, task of anticipating the significance of any known fact that could conceivably affect the conduct of the trial. Such anticipatory reasoning has been rejected by this Court. *Gori v. United States*, 367 U.S. 364, 369 (1961) ("Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused . . .").

"The value of the *Perez* principles lies in their capacity for informed application under widely differing circumstances, without injury to defendants or to the public interest." *Wade v. Hunter*, 336 U.S. at 691. Here, there was no meaningful application of the *Perez* principles to the circumstances as existed when the trial court concluded it had no choice but to declare a mistrial. Nor was there any deference whatsoever paid to the trial court's considered exercise of its discretion.

This Court has condemned application of bright-line and mechanical rules in this area of jurisprudence. *Illinois v. Somerville*, 410 U.S. at 462; *United States v. Jorn*, 400 U.S. at 486. Yet this is precisely what the Connecticut Supreme Court has fashioned; a mechanical rule that focuses solely on the timing of disclosure of some information that pertains directly or indirectly to the reason for a later mistrial.

The fact that certain information was known to the trial court before jeopardy has attached might well be relevant to whether there was a manifest necessity for a later mistrial. *See State v. Buell*, 221 Conn. at 418 (Borden and Covello, Js., concurring). But as Justices Borden and Covello observed, it is "unprecedented and unwise", not to mention unfair, to preclude declaration of a mistrial based to some extent on existing information if, sometime later, a manifest necessity in fact exists. *State v. Buell*, 221 Conn. at 418.

The Connecticut Supreme Court's unprecedented application of the *Perez* rule will inevitably result in injury to the salutary principles of public justice. The State of

Connecticut petitions this Court for review of the decision below to correct this injustice and prevent its proliferation in future cases.

CONCLUSION

By focusing solely on the timing of the disclosure of information relating to the reason for a mistrial, the Connecticut Supreme Court has compromised the "public justice" policy underlying that rule. Its decision is unsupported in law and in reason and will result in injury to the interest of both defendants and the public. The petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted.

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In The

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October Term, 1991

STATE OF CONNECTICUT,

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v.

LARRY BUELL,

Respondent.

APPENDIX

STATE OF CONNECTICUT V. LARRY BUELL
(14166)

Shea, Callahan, Glass, Covello, Borden,
Berdon and Santaniello, Js.

The defendant, who had been charged with two counts of the crime of failure to appear in the first degree, appealed from the trial court's denial of his motion to dismiss the charges against him. He had filed the motion, which he based on double jeopardy grounds after the trial court had, sua sponte, without his consent, declared a mistrial on the third day of his jury trial. The court declared the mistrial concluding that the simultaneous representation of the defendant and a state's witness by the defendant's attorney, W, made it impossible for the trial to proceed. *Held* that because the record indicated that the trial court was made aware, before the jury was sworn, that W represented the state's witness, there was no manifest necessity warranting the declaration of a mistrial; accordingly, further prosecution of the defendant under the circumstances here being violative of the double jeopardy provision of the fifth amendment to the United States constitution, the trial court should have granted the defendant's motion to dismiss.

Doctrine of manifest necessity for declaration of mistrial over objection of defendant, discussed.

Argued October 29, 1991--decision released March 17, 1992

Amended information charging the defendant with two counts of the crime of failure to appear in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Cretella J.*, which, sua sponte, declared a mistrial; thereafter, the court, *Damiani, J., denied the defendant's motion to dismiss and the defendant appealed. Reversed; judgment directed.*

G. Douglas Nash, public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Steven M. Sellers*, assistant state's attorney, and, on the brief, *Michael Dearington*, state's attorney, and *Mary Elizabeth Baran*, assistant state's attorney, for the appellee (state).

Glass, J. The defendant, Larry Buell, was charged by information with two counts of failure to appear in the first

degree, in violation of General Statutes §53a-172.[1] A jury trial commenced on March 21, 1990. The trial court, *Cretella, J.*, sua sponte, declared a mistrial on March 23, 1990, on the basis that defense counsel's representation of a state's witness, Rose Mumford, made it impossible for the trial to proceed. Thereafter, the defendant moved to dismiss the charges against him on the ground that further prosecution would violate the constitutional prohibition against double jeopardy. The trial court, *Damiani, J.*, denied the motion to dismiss. The defendant appealed to the Appellate Court and we transferred the appeal to this court pursuant to Practice Book § 4023. The sole question on appeal is whether the trial court improperly denied the defendant's motion to dismiss made on the ground that a retrial would subject him to double jeopardy, which is proscribed by the fifth amendment to the United States

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[1] "[General Statutes] Sec. 53a-172. FAILURE TO APPEAR IN THE FIRST DEGREE: CLASS D FELONY.(A) Any person who, while charged with the commission of a felony while out on bail or released under other procedure of law, wilfully fails to appear when legally called according to the terms of his bail bond or promise to appear, is guilty of failure to appear in the first degree.

"(b) Failure to appear in the first degree is a class D felony."

constitution. We conclude that further prosecution in the circumstances of this case would violate the prohibition against double jeopardy and, therefore, we reverse the judgment of the trial court.

The facts relevant to this appeal are as follows. From March 5 to March 7, 1990, the trail court conducted jury voir dire. The state's attorney read to two separate jury panels a list of the witnesses that the state intended to call. Mumford's name was not mentioned to either panel. The trial was scheduled to commence on March 21, 1990. On that date, prior to swearing in the jury, the trial court heard argument on three motions to quash subpoenas brought by defense counsel, John Williams. One of the motions concerned a subpoena served upon Mumford.[2] Williams, at that time, told the court that he represented Mumford.[3]

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[2] The remaining motions concerned subpoenas served on Williams' law partner, Sue Wise, and the defendant's mother, Ann Buell.

[3] The following colloquy transpired between the court and the defense counsel:

"Mr. Williams: There are three motions to quash that have been filed your Honor, One was filed this morning.

"The Court: Do you have the other one, the third one there? Do you have the third motion?

(continued...)

Shortly thereafter, during argument on the motions, the state's attorney indicated her opposition to Williams' representation of Mumford.[4] The court denied the defendant's motion to quash. The state then requested permission to add several names to the list of witnesses, including Mumford's. The court granted the state's request

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[3](...continued)
"Mr. Williams: Mr. Clerk?
"Mr. Williams: The first referred to a subpoena served upon Sue Wise. The second is a subpoena served on Ann Buell and *the third a subpoena served upon Rose Mumford, whom I represent.*
"The Court: All right." (Emphasis added.)

[4] The following colloquy transpired between the court and the state's attorney:
"Ms. Baran: Your Honor, I will cite to the court Connecticut General Statutes §52-144, which clearly articulates the form of a subpoena. And as the court is more than well aware, a subpoena is valid for sixty days subsequent to the date cited thereon. And therefore, I would just state to the court that I think that Attorney Williams' argument with regard to these subpoenas is frivolous.
"The Court: Second ground?
"Miss. Baran: The second ground, you Honor, is that *think Mr. Williams represented, much to my surprise, 'all of whom I represent' when he was referring to Rose Mumford, who is an independent witness.*" (Emphasis added.)

over the objection of defense counsel.[5] Thereafter, the jury was sworn.

The state presented the testimony of five witnesses to the jury on March 21 and 22, 1990.[6] On March 23, before the jury was brought into the courtroom, the state's attorney moved to disqualify Williams from representing Mumford. The State's attorney claimed that she had first learned that Williams represented Mumford at the end of the day on March 22. She stated to the court, however, that she opposed a mistrial and recommended that the court appoint other counsel for Mumford. Williams countered that he had filed an appearance on behalf of Mumford with the clerk on March 21 and had personally served the appearance on the state's attorney. Williams informed the court that if called to testify, Mumford intended to exercise

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[5] Defense counsel objected to the proposed addition of witnesses on the basis that the state had been ordered to disclose the names and addresses of all witnesses that it intended to call on the first day of jury selection. Defense counsel requested first, that the trial court order the state to provide the addresses of all witnesses that it intended to call, and second, that the court grant a continuance for defense counsel to investigate the additional witnesses' address but denied the motion for a continuance.

[6] The jury heard the testimony of Judge William Hadden, Minna Dew, Edward Kendall, Robert Sterling and David Schultz.

her right against self-incrimination. He further indicated that the state had been made aware that he represented Mumford on March 21, when he argued the motion to quash the state's subpoena to her.

After a recess, the trial court heard further argument concerning Williams' representation of Mumford. Williams argued that the court should had a hearing, pursuant to *State v. Williams,* 203 Conn. 159, 523 A.2d 1284 (1987), and *United States v. Curcio,* 680 F.2d 991 (2d Cir. 1982), to determine whether the defendant and Mumford would make a knowing and intelligent waiver of the right to conflict free representation. Williams represented to the court that he had advised the defendant and Mumford of their rights of the potential conflicts in dual representation, and that each was prepared to make such a waiver on the record. Despite Williams' assurances and the recommendation of the state's attorney that the court appoint other counsel for Mumford, the court declared a mistrial.

In reaching its conclusion that a mistrial was necessary, the trial court found "it highly improper to have defense

counsel on the day of trial, March twenty one, file an appearance for a person known to be a state witness . . . ." The Court found that Williams' representation of Mumford "pose[d] insurmountable problems and made "it virtually impossible" for the case to proceed. The court stated that if Mumford were called to testify, Williams would have to cross-examine his own client, which created "an unconscionable and impossible hurdle to surmount." The court went on to state that "[it was] with great reluctance" that it could not allow the case to proceed but that it found that Williams' actions had brought about the mistrial. The court concluded that it was impossible" for the case to continue and, sua sponte, declared a mistrial. The defendant subsequently filed a motion to dismiss on the ground that a second prosecution would constitute double jeopardy. The trial court denied the motion to dismiss and this appeal followed.

On appeal, the defendant claims that the trial court improperly denied his motion to dismiss because the declaration of a mistrial without his consent based on his attorney's simultaneous representation of a state's witness

was without manifest necessity. The defendant argues that because the trial court failed to consider the alternatives to a mistrial, the state has not demonstrated manifest necessity. Specifically, the defendant contends that the court should have conducted a hearing pursuant to *State v. Williams*, supra, and *United States v. Curcio*, supra, to determine whether the defendant and Mumford would waive their right to conflict free representation, or at the least should have allowed a continuance to appoint new counsel for Mumford as the state's attorney had recommended. The state argues that the trial court thoroughly considered and rejected the proposed alternative and that a mistrial was manifestly necessary to avoid compromising the fairness of the trial. Because the record indicates that the trial court was made aware before the jury was sworn that Williams represented Mumford, we conclude that there was no manifest necessity for the declaration of a mistrial.[7]

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[7] Because our conclusion that there was no manifest necessity is based on events that occurred prior to the swearing in of the jury, we do not reach the issue of whether, before the trial court declared a mistrial, it should have conducted a hearing to determine (continued...)

"The fifth amendment to the United States constitution provides, in relevant part, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' 'This clause, which is applicable to the states through the fourteenth amendment; *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed. 707 (1969); establishes the constitutional standards concerning the guarantee against double jeopardy. *Crist v. Bentz*, 437 U.S. 28, 98 S.Ct. 2156; 57 L.Ed.2d 24 (1978); *Benton v. Maryland,* supra, 795.' *State v. Roy*, 182 Conn. 382, 385 438 A.2d 128 (1980); see *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1978)." *State v. Van Sant*, 198 Conn. 369, 376, 503 A.2d 557 (1986). Jeopardy attaches once the jury has been selected and sworn. Id.; see *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S.Ct. 1066, 35 L.Ed.3d 425 (1973). The constitutional protection afforded by the double jeopardy clause includes the defendant's "valued right to

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[7](...continued)
whether the defendant and Mumford would waive their right to conflict free representation. This court has previously recognized the importance of the trial court's consideration of the alternatives to a mistrial in determining whether manifest necessity existed. See *State v. Van Sant,* 198 Conn. 389, 381, 503 A.2d 5587 (1986).

have his trial completed by a particular tribunal.' *Arizona v. Washington*, supra." (internal quotations marks omitted.) *State v. Van Sant*, supra.[8] This right is not absolute, however, and may in some cases be subordinated to "the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, supra, 505.

"In construing the double jeopardy clause of the United States constitution in the context of a declaration of a mistrial over a defendant's objection, the seminal decision is *United States v. Perez* [22 U.S. (9 Wheat.) 79, 6 L.Ed. 165 (1824)]." *State v. Van Sant*, supra, 377. "Justice Story, writing for the United States Supreme Court in *Perez,* set forth standards for determining when to order a retrial

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[8] In *Arizona v. Washington*, 434 U.S. 497, 503-504, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), the United States Supreme Court set fourth the reasons behind the constitutional protection of a criminal defendant's right to have his trial completed by a particular tribunal: "[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." The Court stated further that "[t]he danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed," and that, therefore, "as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." id., 505.

after the declaration of a mistrial over the defendant's objection. He said: 'We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .' *United States v. Perez*, supra. 580." *State v. Van Sant*,. supra, 378. The United States Supreme Court has continued to adhere to the "manifest necessity" standards set forth in *Perez*, and has rejected "the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." *Illinois v. Somerville*, supra, 462; see also *United States v. Jorn* 379, 400 U.S. 470, 480, 91 S.Ct. 547, 27 L.Ed. 2d 543

(1971). We have similarly eschewed a mechanical application of the manifest necessity standard. *State v. Van Sant*, supra, 379.

"'The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.'" Id. quoting *Arizona v. Washington*, supra. "With respect to construction of the terms 'manifest necessity,' a 'high degree' of 'necessity' is required before a conclusion may be reached that a mistrial is appropriate. . . ." *State v. Van Sant*, supra, quoting *Arizona v. Washington*, supra 506-507. A trial judge must therefore engage in a "scrupulous exercise of judicial discretion" *United States v. Jorn*, supra 485; in order to "assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." Id., 486 The duty of the trial court to exercise such discretion is not diminished by any contribution the litigants may arguably have made to the situation in which the court finds itself. Id. 485-86.

"'A reviewing court looks for a manifest necessity by examining the entire record in the case without limiting

itself to the actual findings of the trial court. . . .'" *State v. Van Sant,* supra. "It is the examination of the propriety of the trial court's action against the backdrop of the record that leads to the determination whether, in the context of a particular case, the mistrial declaration was proper." Id. Applying this standard of review to the present case, we conclude that the trial court was not warranted in declaring a mistrial.

The record reveals that Williams first brought his representation of Mumford to the attention of the trial court on March 21, 1990, the day the trail was scheduled to commence. At that time, Williams proffered three motions to quash subpoenas. In referring to a subpoena that the state had served on Mumford, Williams clearly stated that he represented her. The state's attorney remarked on Williams' statement shortly thereafter, indicating that she opposed his representation of Mumford. Much of the ensuing argument, however, concerned a subpoena that had been served on Williams' law partner, Sue Wise. After the court denied all three motions, the state's attorney requested, and was granted, over Williams'

objection, permission to add several names, including Mumford's to the witness list. These events transpired *before* the jury was sworn.

We recognize "that a criminal trial is, even in the best of circumstances, a complicated affair to manage." *United States v. Jorn*, supra, 479. Nevertheless, "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one." *Illinois v. Somerville*, supra, 471. "[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, supra, 486. "Manifest necessity" by definition requires an element of surprise; that is, the reason for the declaration of a mistrial arises or becomes known to the court only *after* the jury has been sworn and jeopardy has attached.[9] See, e.g.,

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[9] This does mean, however, that something that was known prior to the jury being sworn could never assume a significance it did not originally appear to have had and thus constitute a legitimate ground for a mistrial. As this court has stated: "Manifest necessity is (continued...)

Cherry v. Director, State Board of Corrections, 635 F.2d 414 (5th Cir.), cert. denied, 454 U.S. 840, 102 S.Ct. 150, 70 L.Ed. 2d 124 (1981)(court excused juror and declared mistrial after learning that juror's mother had died); *Arizona v. Washington*, supra (court declared mistrial due to improper and prejudicial comment of defense counsel during opening statement). Here, the defendant's trial had proceeded for two days, through the testimony of five witnesses, before the trial court declared a mistrial, yet the cause to which the court attributed the necessity for a mistrial had been disclosed to the court and the prosecutor before the jury was sworn. Nor does this case present circumstances in which we must accord "special respect" to the trial court's determination, as in cases involving possible juror bias; *Arizona v. Washington*, supra, 510-14; or the inability of the jury to reach a verdict. See *United States v. Perez*, supra. In the circumstances of this case, therefore, we are constrained to conclude that further prosecution of

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[9](...continued)
not amenable to a precise formulation or mechanical application because the 'high degree' of necessity mandated by that phase can be found in a variety of circumstances. . ." *State v. Van Sant*, 198 Conn. 369, 379, 503 A.2d 557 (1986).

the defendant would violate the double jeopardy provision of the fifth amendment.

The judgment is reversed and the case is remanded with direction to grant the motion to dismiss.

In this opinion SHEA, CALLAHAN, BERDON and SANTANIELLO, JS., concurred.

BORDEN, J., with whom COVELLO, J., joins, concurring. I agree with the result reached by the majority opinion, but I disagree with its analysis. I believe that the opinion reli

es on an analysis that is much more simple than the case requires and that is not supported by the cases upon which it relies.

The entire basis of the lack of manifest necessity, as I read the majority opinion, is that the trial court was made aware of the fact of dual representation by Williams before the jury was sworn. The only authority offered by the opinion for this basis is the following: "'Manifest necessity' by definition requires and element of surprise; that is, the reason for the declaration of a mistrial arises or becomes known to the court only *after* the jury has been sworn and

jeopardy has attached. See, e.g., *Cherry v. Director, State Board of Corrections*, 635 F.2d 414 (5th Cir.), cert. denied, 454 U.S. 840, 102 S.Ct. 140, 70 L.Ed. 2d 124 (1981) (court excused juror and declared mistrial after learning that juror's mother had died); *Arizona v. Washington, [434 U.S. 497, 98 S.Ct. 824, 54 L.Ed. 3d 717 (1978)] (court declared mistrial due to improper and prejudicial comment of defense counsel during opening statement)." (Emphasis in majority opinion.)*

Neither of these cases, however, nor any other case that I have read in this area, stands for the proposition that there is no manifest necessity unless the reason for the mistrial arises or becomes known to the trial court after jeopardy has attached. Of course, in both *Cherry v. Director, State Board of Corrections,* supra, and *Arizona v. Washington*, supra, the mistrial was declared after jeopardy had attached, and in both cases that was when the reason for the mistrial arose and became known to the judge. That is the usual scenario, because ordinarily the two predicates--the reason for mistrial and the declaration of a mistrial--occur more or less at the same time. But I fail to

see how that means that where, as here, the information is made known to the trial judge before the jury is sworn, but neither the state, the defendant nor the court fully appreciates its significance at that time, somehow the court is later precluded, ipso facto, from later declaring a mistrial based on that reason if, at the later time, manifest necessity in fact does exist. Yet, despite the purported disclaimer in footnote 9 of the majority opinion, that is precisely what the majority in this case says.

I agree that the fact that the dual representation problem was brought to the attention of the trial court, albeit indirectly, before the jury was sworn may be relevant to whether there was manifest necessity for a later mistrial. It seems to me, however, that using the timing of the disclosure as the sole basis of the decision, particularly here where that disclosure was made in the course of a hearing on a motion to quash a subpoena that had nothing to do with dismissal or double jeopardy, is unprecedented and unwise.

I believe, therefore, that a more detailed analysis is required, one that employs the appropriate standards for

determining whether manifest necessity existed in this case. Neither those standards nor how they are to be applied is very clear from the case law. Some of them are as follows.

The state has the burden of establishing manifest necessity, which does not mean an absolute or literal necessity for a mistrial but only a "high degree" of necessity. *Arizona v. Washington*, supra, 506. We give a great deal of deference to the trial judge's decision. Id., 514. The ultimate issue is whether the trial judge exercised sound discretion. Id. Implicit in the decision is the requirement that the trial judge considered the available alternatives to a mistrial. *Cherry v. Director, State Board of Correction*, supra, 418; see also *State v. Van Sant*, 198 Conn. 369, 381, 503 A.2d 557 (1986) (trial court realistically considered alternatives to mistrial). A trial judge has acted with sound discretion in rejecting alternatives to a mistrial if reasonable trial judges could differ about the proper disposition, even if the mistrial was not strictly necessary. Id. 381 n.10. If the record indicates that the trial judge acted erratically or precipitously, his determination will not be upheld. *Granberry v. Bonner*, 653 F.2d 1010 (5th Cir. 1981). These

are just some of the applicable standards; other cases reinforce one or more of these factors, depending on the facts of the case.

Applying these factors, I conclude that this is a very close case. A good argument can be made for affirmance here: the trial court's action is entitled to great deference; arguably, reasonable trial judges could differ--in fact, not one but two trial judges, Judge Cretella and Judge Damiani both agreed on the necessity for a mistrial; the reason for the mistrial was based on the conduct of the defendant's counsel in undertaking to represent a state's witness; and the judge did not act erratically or precipitously--he took a recess, heard argument, and presumably considered the alternatives, which he felt were unsatisfactory because of what he perceived as a conflict of interest.

Nonetheless, I conclude that there was an abuse of discretion in this case. First, it seems to me that the whole discussion of a conflict of interest was beside the point. There was no conflict of interest, in the sense of divided loyalties, by Williams representing both the defendant and Mumford, where, as represented to the court by Williams,

Mumford was going to exercise privilege not to testify. If anything, both Mumford's interest and the defendant's interest were the same at that point. There would only have been a conflict of interest if Mumford were to have testified, or there arose some inducement to her to testify that would have benefited her and not the defendant. But the record discloses nothing like that. In any event, clearly uch a conflict was waivable by the defendant and by Mumford, pursuant to a proper canvass and hearing.

What was really at issue, then, was not an actual or potential conflict of interest in its ordinary sense, but the fact that Williams, by representing a state's witness and advising her to exercise her privilege, was interfering with the state's proof. I agree that the trial court was perfectly correct in not letting that happen, but the easily available remedy was simply to disqualify Williams from representing Mumford, rather than to abort the entire trial. Even then, if Mumford elected to stand on her privilege and not to testify, there would have been no conflict of interest, because Williams would not have had to cross-examine her. And if she changed her mind and did testify, at that point

it would have been up to the defendant whether to waive any conflict in keeping Williams as his attorney.

Furthermore, neither the state nor the defendant wanted a mistrial, and both suggested alternatives to the trial court--the state, to disqualify Williams from representing Mumford, and the defendant, to hold a "conflict waiver" hearing, which Williams represented would yield a waiver by both the defendant and Mumford. In addition, the state knew before the jury was sworn that Williams represented one of its witnesses, and took no action to forestall the attachment of jeopardy. Since the state has the burden of establishing manifest necessity, it should bear whatever fault there may be for not warning the trial court about the problem of jeopardy before it attached.

Moreover, the problem surfaced before the jury was sworn, but not acted upon until the third day of trial. Thus, the defendant was required to undergo three days of unnecessary trial expense and anxiety.

Finally, the state has the burden to establish a high degree of necessity for the mistrial. Under all of the

circumstances, I do not think that high degree of necessity was established here.

I therefore concur in the result reached by the majority.